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By

Dr. Arthur K. Kuhn
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Extract from the Publication: Festschrift für Georg Cohn.



Zurich 1915

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The effects of war upon the political, economic and social life of neutrals have been perhaps more severe and striking at the present period than ever before in the history of the world. This was not wholly unexpected. The higher standards of living, the varied products demanded by modern industries have made all nations interdependent. War closes the regular channels of commerce and communication, and neutrals therefore suffer as much, sometimes even more than belligerents. While these conditions have received widespread attention, the complexity which the war has introduced into the legal relations of private individuals in neutral countries has not been fully realized.

As one looks back to the period immediately preceding the great cataclysm of 1914, one recalls the unusual interest shown in Continental countries in the English doctrine of the effect of war on contracts. The international commercial community seems to have had a sense of the approaching storm. The extensive commerce between Continental countries and Great Britain and, more especially, the widespread insurance obligations of British subjects and British companies, with reference to persons and property located upon the European Continent, particularly in Germany and Austria, gave great practical importance to a knowledge of the legal situation in the event of war. The whole effect of the peculiar doctrine of the English common law seemed suddenly to dawn upon the minds of German commercial men and a number of inquiries were made not only about the state of the law, but also as to the probable attitude of British companies, especially insurance companies, in the event of war.

There was no denial of the fact that war between England and Germany would seriously affect contract obligations under English law, but it was stated in authoritative quarters that British merchants, particularly the marine insurance

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companies, would not rely upon the strict letter of the law, but would carry out their contracts in recognition of moral obligations.

Peculiarly enough, an able review of the law upon the subject was completed just prior to the war by Dr. T. Baty, an English barrister, at the request of the Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre, a German translation of which was published in the "Blätter" of the association (October 1914, p. 106) under the title "Die englische Lehre von den Verträgen mit Feinden". It is therefore unnecessary to enter into a further study of the doctrine academically. The purpose of this paper is to discuss some of the practical problems which actually arose.

At the outbreak of the war, neutral merchants were in the position of awaiting shipments of merchandise from oversea countries and ports, to be shipped in vessels many of which belonged to owners in belligerent countries, especially Great Britain and Germany. The outbreak of war produced a very real and present risk which none of the parties contemplated. It is well known that marine insurance covers only the ordinary perils of the sea and not the risk of destruction or capture by the enemy. If insurance could have been effected at reasonable rates, the problems would have been comparatively easy, but in the early months of the war, war-risk insurance was quoted at enormously high rates and in many cases could not be effected at all. To meet this situation, neutral governments, that of the United States for instance, established governmental war-risk bureaus; but this required some time to accomplish. Upon whom should the cost of insurance fall, or who should bear the loss in case of destruction or capture of the merchandise in the meantime?

American merchants had a large number of contracts for the shipment of produce from Asiatic ports to ports in the United States and Europe. Of course, where the contract provided that one or the other of the parties was to bear

all the risks of transportation, the question was clear. Thus, where the goods had been sold and shipped from the Far East "to be delivered at New York during January to December" or where the contracts read f. o. b. a certain port, the seller must be taken to have assumed the risk, even the unexpected risk arising out of conditions of war.

A more difficult question arose where, for example, the contract read that the goods were sold at a certain price "c. i. f. to be shipped from the East to New York". The terms "c. i. f." (cost, insurance, freight) are exceedingly common in oversea commerce and indicate that the price mentioned includes not only the cost of the goods, but also freight and insurance. Both by the custom of trade and the decision of the courts in England and the United States, the seller, under these terms, does not take the risk of transportation. A specific case will be instructive. In *Mee vs Mac Nider* (1888) 109 N. Y. 500, the contract sued upon read as follows:

"NEW YORK, Jan. 3, 1882.

Sold for account of Mee, Billings & Co., London, to James Mc. Nider, 500 bags prime fermented Bahia cocoa at 59 shillings per cwt. c. i. f. by steamer to New York, buyers to furnish cable credit or pay bankers commission".

The goods arrived wet and damaged from the voyage. The New York Court of Appeals, in deciding in favor of the sellers, said:

"The purchaser deals with the matter in gross and not in detail, transacts the various branches of the business with one person instead of three, fixes his liability at a lump sum, and in case of loss, will recover the amount of his interest under the policy On the part of the vendor, the shipment by steamer was an effectual appropriation of the cocoa to the buyer, and at that moment the agreement on the vendor's part was executed."

The question then remains as to whether an agreement to provide insurance includes anything further than marine

insurance. Of course, if it signifies insurance against every kind of risk, the seller would have to present a policy covering war risk in case of war. But the custom of merchants seems to be otherwise and the burden of proof is on the buyer to show that the intention of the parties contemplated something more.

The same rule has been followed in England (Ireland vs Livingston, 1872, L. R. 5 House of Lords, 395—406). In an Australian case (Bowden vs Little, 1907, 4 Comm. 1364), the court specifically said that if the buyer could prove that the custom of merchants in the particular line of trade was accepted as indicating a contract under which the seller bound himself to deliver at the port to which the goods were consigned, it would be a different matter.

In the law of England and the United States just as in the law of Continental countries, the ownership of the goods passes to the buyer as soon as the goods are delivered to the carrier designated in the contract, even though the carrier receives the goods at the seller's domicile and not the buyer's. It is only where the contract specifies delivery at some other place, such as the buyer's domicile, that the buyer takes the risk of transportation.

Of course parties to a contract may, and frequently do vary the terms of their agreements by mutual consent *ex post facto*. Thus, many Italian firms with contracts for shipment from North and South American ports arrived at understandings with their shippers, after the outbreak of the war, so as to avoid all dispute. In this manner, large quantities of merchandise destined for Italy and Switzerland were promptly delivered upon reasonable terms.

In the examples already given, the outbreak of war did not vary the obligations of the parties. The question was simply one of *interpretation*. We now come to a totally different class of cases, namely those in which dealing with an enemy is involved in the performance of the contract by one of the parties and therefore the obligation of both parties is affected by a state of war.

A very large part of the business of exporting grain from the United States and from countries of South America is transacted through sales made in London on forms of contracts known as "Grain Contracts of the London Corn Trade Association". At the outbreak of the war, commercial firms in the United States and countries of South America had pending contracts for the sale and shipment of grain from American ports to European ports such as Antwerp, Rotterdam, Trieste and Fiume. These contracts contained the following clause:

"Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding;... Such disputes shall be settled according to the law of England, whatever the domicile, residence, or place of business of the parties to this contract may be or become."

The contracts also provide that any dispute shall be referred to arbitration in England and that the courts of England, or arbitrators appointed there, shall have exclusive jurisdiction.

Upon the outbreak of the European War, unusual and unprecedented conditions existed in all North and South American ports, making it extremely difficult to obtain shipping facilities to European ports. German and Austrian ships cancelled their sailings; British ships, of course, did not clear for ports of their enemies; freight rates rose to an almost prohibitive price and the insurance of war risk was practically unobtainable until governmental bureaus had been established for this purpose.

Under these unusual conditions, the owners of the grain who were under contract to deliver in European ports were most unwilling to carry out their contracts, especially in view of the fact that the market price of the merchandise also increased by reason of the war. We are assuming for this discussion, however, that the sellers were acting in perfect good faith.

A notable distinction must be mentioned between the Anglo-American doctrine of contract and those prevailing in countries of the continent of Europe. Generally speaking, the common law of England does not recognize relative impossibility as an excuse for non-performance unless performance was made impossible by "act of God or the public enemy". In other words, it is only a particular kind of *vis major* which excuses the non-performance of contracts under the English and American law. A contract is prevented by an "act of God" only where the impossibility results directly or proximately from some superhuman power such as the action of the elements. The conditions caused by the outbreak of war could not possibly come under this head; nor could they come under the second exception because they were not the result of acts of an enemy of the United States or of any South American country, for these countries were at peace with all the world.

In this respect, the obligation of contracts under English and American law is much more strict and positive than under the law of countries of the Roman civil law. Thus the French Code Civil (Art. 1048) excuses performance where "par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire". And the German Bürgerliches Gesetzbuch (Art. 323) recognizes the discharge of an obligation through impossibility „in Folge eines Umstandes . . den weder er noch der andere Teil zu vertreten hat“; and the Swiss Obligationenrecht (Art. 119) „soweit durch Umstände, die der Schuldner nicht zu verantworten hat“.

Kohler, in commenting on the German doctrine says (Holtzendorffsche Encyklopädie, I, p. 709):

„Die höhere Gewalt verlangt eine Einwirkung von aussen, die so stark ist, dass selbst eine spezielle Vorsicht sie nicht zu beschwören vermöchte.“

It will be seen that where the Continental theory adopts only a subjective impossibility, the Anglo-American theory

inclines toward the objective. A few examples will suffice. In an English case, the defendant sold the plaintiff a quantity of Manila hemp to be shipped from the Philippines by sailing vessel between certain dates, the agreement providing that if the goods did not arrive from loss of vessel or other unavoidable cause, the contract to be void. The Spanish-American War prevented the shipment of the goods, but the court held that this clause applied only to goods actually shipped and declared that there was no implied condition in the contract as to impossibility of shipment resulting from war (*Ashman vs Cox*, 1899, 1 Q. B. D. 439).

It has been held that the confiscation of a cargo by revenue officers at a foreign port or the impossibility to load the goods by reason of the prevalence of cholera at the foreign port, are not excuses for non-delivery. (*Spence vs Chodwick*, 1847, 10 A. & E. (N.S.) 516, *Barker vs Hodgson*, 1814, 3 M. & S. 267).

There is indeed a tendency in recent cases to introduce exceptions into this strict doctrine where the impossibility results from a contingency which, had it been contemplated by the parties, would have been regarded by both as "so obviously terminating the obligation as not to require expression". (*Columbia Law Review*, 1900, p. 533; *Kinzer Construction Co. vs the State*, 1910, 125 N. Y. Supp., p. 46). In this way certain very extreme cases have been held not to come within the strict doctrine, but there is no decision known to the writer, either in England or the United States, which holds that the continuance of a state of peace is a condition implied by law.

There was, it is true, in some of the grain contracts referred to, the following provision:

"Should shipment be prevented by prohibition of export, blockade or hostilities, this contract, or any unfulfilled part thereof, to be cancelled."

Here we have a question of interpretation. If the clause were found in an ordinary contract, it is doubtful whether

it would have excused performance, because the countries in which the sellers were domiciled and to which they owed allegiance were not engaged in *hostilities*; neither could it be asserted that shipment was actually *prevented* by hostilities.

Accordingly, the breach of these grain contracts might have been a serious matter for the neutral sellers. But now enters an entirely new element. We have seen that *by their terms*, the contracts were to be governed by the law of England. And if, before the time for performance arrives, English law has made performance *unlawful*, either party may treat the contract as dissolved. Herein lies the crux of the situation.

In relying upon the English law to justify an excuse as well as to impose an obligation the neutral seller might very well be heard to say with Schiller's Maria Stuart (1, 7):

“Wenn man mich denn so streng nach englischem Recht
Behandelt, wo dies Recht mich unterdrückt,
Warum dasselbe Landesrecht umgehen,
Wenn es mir Wohltat werden kann?”

Who would have anticipated that a clause ostensibly made for the *benefit* of the English or Continental purchaser, acting through his London agents, would have had just the contrary effect? Who would have anticipated that legislation subsequently passed in England, would subvert the obligations of an English contract?

By proclamations of the English Crown, dated August 5th, and 12th, 1914, respectively, applicable to Germany and Austria-Hungary, known as “Trading with the Enemy Proclamation No. 1” it is made unlawful:

“to supply to or obtain from the said Empire any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from any person resident, carrying business, or being therein,

nor to trade in or carry any goods, wares or merchandise destined for or coming from the said Empire, or for or from any person resident, carrying on business, or being therein . . .”

And by proclamation of September 9th, 1914, known as “Trading with the Enemy Proclamation No. 2” and supplanting Proclamation No. 1, all persons in the British dominions are warned: —

Art. 5, (7) Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person, any goods, wares or merchandise, for or by way of transmission to or from any enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy;”

The proclamations apply *upon their face* to the contracts now under consideration where the destination was Trieste or Fiume. The same would apply to sales to Antwerp based on such a time of shipment that the goods would have reached Antwerp after the investment by the Germans. As to shipments to Rotterdam or any other neutral port, the proclamations would apply, provided it could be established that the purchaser or the ultimate destination was German or Austro-Hungarian. (Baty, Law Quarterly Rev., January, 1915, citing “Jonge Pieter”. 1801, 4 G. Rob. 79).

In deciding the case of the “Jonge Pieter” above mentioned, Sir William Scott said: —

“All trade with the enemy is illegal; and the circumstance that the goods are to go first to a neutral port will not make it lawful. The trade is still liable to the same abuse and to the same political danger, whatever that may be.”

The fact that the American shipper is the subject of a neutral country is quite immaterial in this aspect; firstly, because the parties have expressly made a choice of the

English law; secondly, because the buyer's performance has been made unlawful and hence the seller must also be relieved from his part of the contract. As Wharton says (Conflict of Laws, 2nd ed. vol. 2, p. 900): —

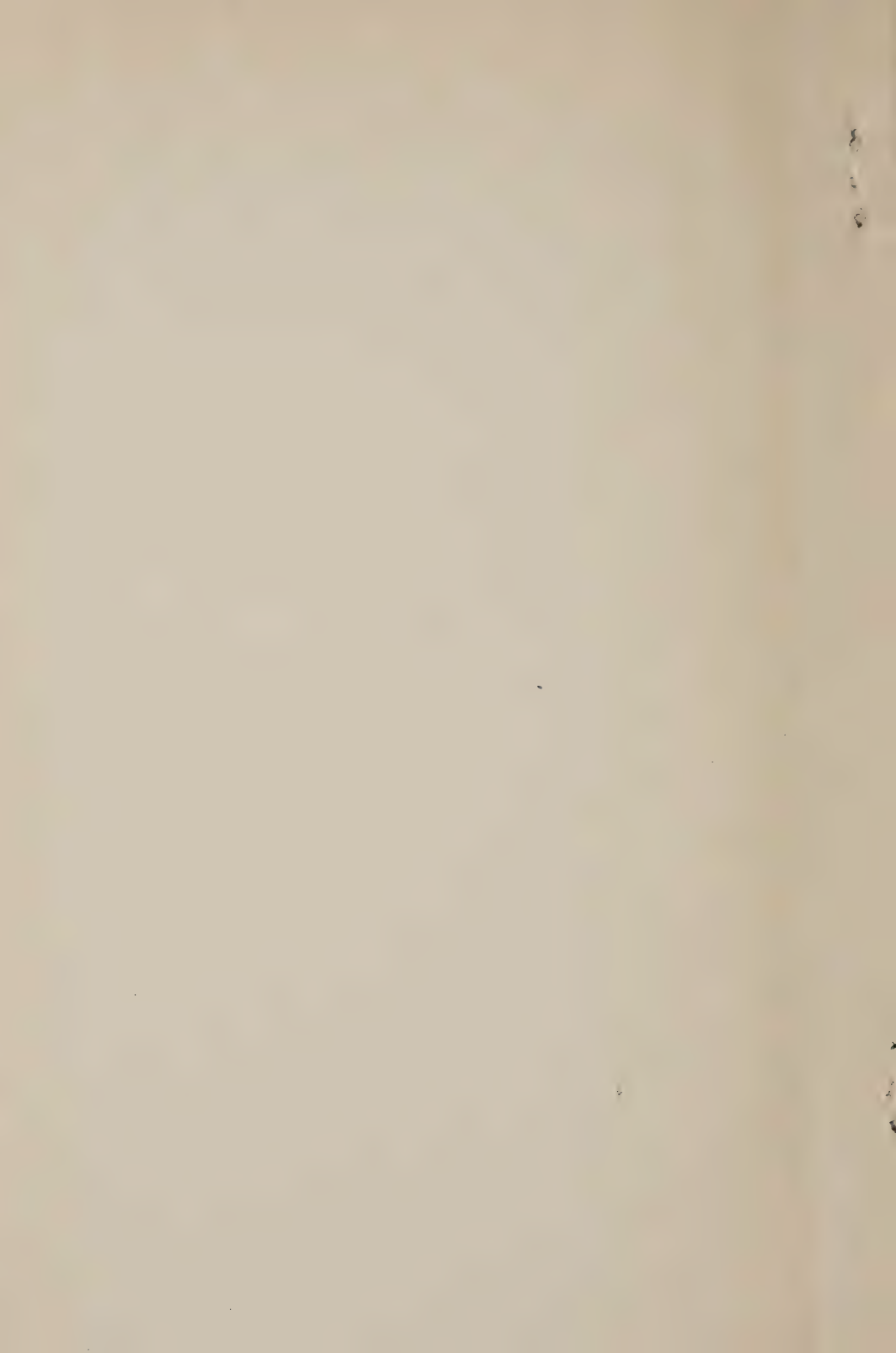
"The governing law with respect to the obligation of the contract . . . is, with certain exceptions hereafter referred to, dependent ultimately upon the intention of the parties, expressed or presumed. This is true not only so far as the obligation depends upon the interpretation of the language used by the parties, *but also so far as it depends upon local laws which add to, or subtract from the rights and duties of the parties to the contract as fixed by its terms.*"

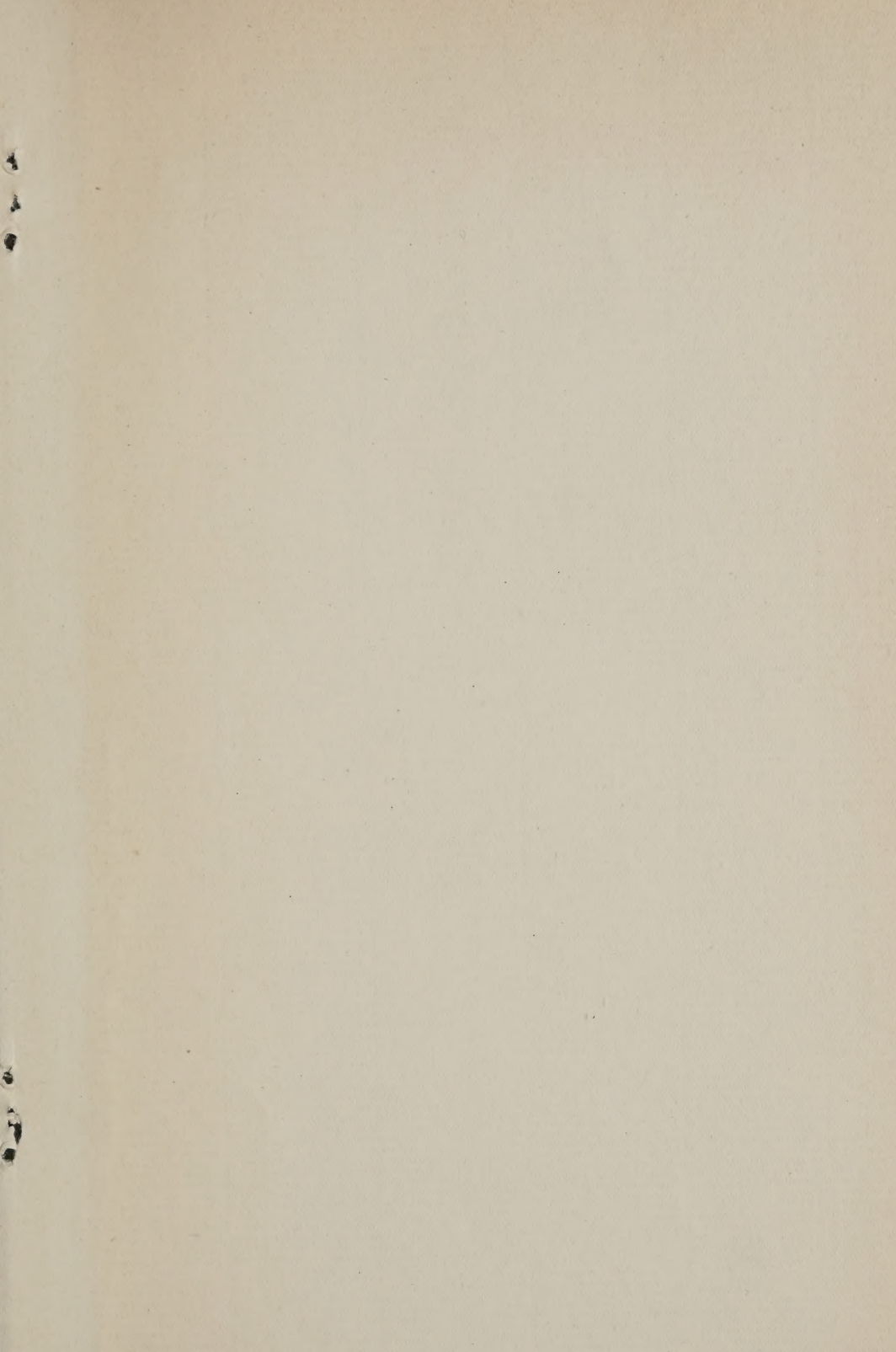
Finally, with regard to the attitude of English insurance companies on risks undertaken before the war, even though they were affirmatively willing to meet their obligations, Proclamation No. 2, Art. 5 (6) expressly prohibits not only the making of new insurance, but the payment of any risk for the benefit of an enemy undertaken before the outbreak of war. Of course, so far as this affects belligerents, it is not within the scope of this paper. But we mention it because it also affects *re-insurance*. So that, where a *neutral* insurance company, for example in Switzerland or the United States, had insured a German or Austrian risk, and re-insured in a British company, payment, even voluntary, is prevented by the proclamation, under criminal penalties. While it is not expressly so stated in these Proclamations, it may be assumed that the obligation is not *void*, but merely *suspended* during the continuance of the war. (See Schuster, *The Effect of War and Moratorium on Commercial Transactions*. p. 9). And yet, where premiums are payable during the period, the prohibition against accepting them, even from neutrals, where the policy is for the benefit of an enemy, may prove to have serious effects upon the mutuality which is the very substance of the obligation.

In conclusion we may say that the old theory of Bynkershoek (*De rebus bellicis*, c. iii) of the possibility of a partial state of war: —

"Pro parte sic bellum pro parte pax erit inter subditos
utriusque principis"

seems to have received a final quietus by the practice of nations in this twentieth century. The argument of the Kings Advocate to the contrary, in the famous case of Potts vs. Bell (1800, 8 T. R. 548), has everywhere celebrated a most diabolical triumph: "There is no such thing as a war for arms and a peace for commerce."



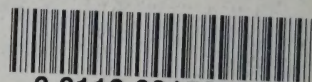


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